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SAINT LOUIS, SEPTEMBER 13, 1878.

CURRENT TOPICS.

THE Supreme Court of Nebraska, in the case of *Chapman v. Hall*, decided last month, held that a covenant against incumbrances is a present engagement that the grantor has an unincumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once if an incumbrance existed at the time of the conveyance. See 3 Washburn on Real Property, 4th ed., 349; Morrison v. Underwood, 20 N. H., 367; Pillsbury v. Mitchell, 5 Wis., 17. In Foote v. Burnet, 10 Ohio, 333, a different conclusion was reached. The court say: "If the first grantee continues in possession of the land whilst his title remains undisturbed, and conveys to a subsequent grantee, in whose time an outstanding incumbrance is enforced against the land, justice requires that this subsequent grantee should have the benefit of the covenant against incumbrances to indemnify himself." No case is cited by the court in support of its position except that of Backus v. McCoy, 3 Ohio, 211. In that case the court say: "If the grantor, at the time of executing the conveyance, was in possession of the land, either as disseizor or under color of title, it cannot be said that he was not seized of an estate in the premises. When the grantor is not seized, either in deed or in law, at the time of conveying, the covenant of seizin must be broken at the moment of executing the deed containing it, and becomes thereby a mere chose in action, and no longer annexed to, or passing with, the land."

THE appointment of a receiver as regards his right to property and possession, it is held by the Supreme Court of this State in the late case of *Maynard v. Bond*, dates from the entry of the order appointing him and not from the time when he gives bond in compliance with the order of his appointment. SHERWOOD, C. J., delivered a brief opinion: "He is elsewhere spoken of as the 'hand of the court,' and the property or fund entrusted to his care is regarded as *in custodia legis*, and that his appointment is in effect an equitable execution. High on Receivers, sec. 1 and 2 and cas. cit. In Steele v. Sturgis, 5 Abb. Pr. 442, it is said: 'The counsel for the sheriff only objects that he was prior in right to the receiver, because his levy was made before the receiver had executed and filed the bond to be given by him. When the court, in such cases, appoints a receiver, it is because the court has first adjudged that the property is no longer to be under the control of the parties to the suit, but it is thenceforth to be *and is in the custody of the court.* The receiver then becomes merely an agent through whom the court acts; and whether he be forthwith appointed by the court as in this case, or a reference be made to a master or referee to appoint one, in either case the effect is the same; the title of the receiver is of the date at which it is ordered that a receiver shall be appointed. Then the title of the partners to control dies, and then the title of the court and of its agent and officer immediately succeeds. As in case of natural death the *formal* title * * * of an executor does not become complete until letters * * * * testamentary are granted as the evidence of title, but the title of the * * * executor, when he is appointed, takes effect from the moment death terminates the title of his testator. So also it is with the title of the receiver. The order of the court either impliedly or expressly takes the title from the parties, and vests it in the receiver as from that moment. It is enough, however, if it took it from the parties; after that no execution could be levied upon it," and the motion the sheriff deliver over the property to the receiver was granted. A similar enunciation was made in Rutter v. Tallis, 5 Sandf., 610, and this Mr. High, in his recent work, High on Receivers, § 136, announces as the better doctrine. A different result has been reached in Maryland, Farmers' Bank v. Beaston, 7 G. & J., 421, and it is there held that the property of a defendant will not be sequestrated until actually reduced into the receiver's possession. This last case in the only one I find directly opposed to the New York authority, and also to that of Fairfield v. Weston, 2 Sim. and Sto. 96, and to Edwards on Receivers, pp. 4 and 22. We incline to the opinion that the receiver's appointment should date from the time the order is entered, regarding this view as better sus-

tained by reason, as it certainly is by authority, and we the more readily incline to this view because, if upheld, it will greatly tend to prevent any unseemly conflict of jurisdiction, and because, further, a party claiming an adverse interest may appeal to the court appointing the receiver to take the necessary steps to protect that interest. High on Receivers, § 142; Sto. Eq., § 833."

In *McCarty v. Lavashe*, decided by the Supreme Court of Illinois during the last term, in a suit by a creditor against a stockholder to recover a debt of the corporation, under a provision in its charter that "each stockholder shall be liable to double the amount of the stock held and owned by him," it was held that the defendant was estopped from denying his liability on the ground that the corporation was never legally organized, the act under which the incorporation was had being unconstitutional. The same question, the court said, had been several times considered in analogous cases. See Baker v. Brannon, 6 Hill, 47; Embury v. Conner, 3 N. Y. 511; Eastin v. Aspinwall, 19 N. Y. 119; Mead v. Keeler, 24 Barb. 20; Ferguson v. Landram, 5 Bush, (Ky.) 230. These were all cases where the parties were held to be estopped from insisting that the organization was illegal as a law, unconstitutional, because of the acts or consent of the parties urging the objection. In the same court analogous questions have been presented and determined. In the case of Tarbell v. Page, 24 Ill., 46, it was held that in a suit by a creditor against a stockholder, the former could not show that the corporation had failed to file a certificate of organization with the Secretary of State; that in a collateral proceeding the regularity of the corporate organization could not be questioned. Rice v. R. I. & A. R. R. 21 Ill. 93; Goodrich v. Reynolds, 31 Ill. 490. "Justice, morality, public policy and precedent," said the court "all demand that appellant should be estopped from denying the constitutionality of the law. If stockholders might show the law unconstitutional and their organization void, and all of their acts unauthorized, then all persons engaged in its organization, should be held liable for the consequences of heir illegal and unauthorized acts, independent of the clause in their charter, So they should in no event escape liability for obtaining money without authority. Suppose these stockholders had formed a partnership containing precisely the same provisions that are contained in their charter, and had put in capital stock to the same extent and the same amounts they each subscribed in shares, would any one question the legality of the organization, or the legal liability of each of the members of the firm? We apprehend these propositions would be conceded. And, if so in principle, what distinctions can be taken between the supposed case and the one at bar? Had the stockholders written under the charter a statement that it was unconstitutional and void as a law, but that they adopted it as articles of partnership, and that each would be bound by its terms and conditions, and would pay in for capital stock the sums set opposite their several names, and they had signed it and specified the sums to be paid in, could it be doubted that each member would have been liable under the articles thus executed? and if so, when stript of mere form, and substance is alone considered, this organization is in effect the same. We can preceive no well grounded distinction. We are therefore of the opinion that, independent of all constitutional questions, each shareholder became liable, under the charter, as articles of partnership, as it operated as an agreement by each subscriber to be liable to creditors to double the amount each subscribed."

THE FOURTH VOLUME OF THE "AMERICAN DECISIONS."*

This series grows better as its volumes multiply. The decisions in the fourth volume cover three years—from 1808 to 1811—and embrace seventeen volumes of reports from the States of Massachusetts, (5 and 6 Mass.), Connecticut, (4 Conn.), New York, (4 and 5 Johns.) New Jersey, (2 Pennington), Pennsylvania, (2 Binney), Virginia, (2 Hening & Munford, 1 Munford), North Carolina, (1 Murphey), South Carolina, (2 Brevard, 3 Desaussure, Eq.,) Kentucky, (1 and 2 Bibb,) and Georgia, (1 T. U. P. Charlton). Some-

*The American Decisions, containing all cases of general value and authority decided in the courts of the several states, from the earliest issue of the state reports to the year 1869. By John Proffatt, L. L. B., author of a "Treatise on Jury Trial," etc. Vol. IV. San Francisco: A. L. Bancroft & Co., 1878.

what out of their chronological order there appear several cases from the first and second volumes of Tyler's Vermont Reports, (1801-1803), the result of a second examination made of them by the editor, who at first had rejected these reports altogether as containing no cases of sufficient general importance to entitle them to a place in this work.

In *Phelps v. Goddard*, 1 Tyler, 60, where several persons, by a combination, enticed a citizen of Vermont to go to another state, that he might be there arrested on civil process, and he was so arrested, it was held by the Supreme Court of Vermont that they were liable to him in an action on the case, although the debt for which he was arrested was justly due. "It certainly is not for the peace of society," the court sternly remarked, "to sanction combinations to entice our fellow-citizens within the jurisdiction of other states and the process of their courts. The law abhors deceit, and it is to be hoped that our halls of justice will be the last places polluted with the maxim of modern ethics—that the end justifies the means." *Coon v. Moffett*, 2 Pennington, 583, decided by the Supreme Court of New Jersey, is a leading case on the common law action of seduction. It was decided in this case that an action may be maintained by a mother for the seduction of her minor child, although the seduction took place in the life-time of the father, and the loss of service happened after his death. In a very lengthy and exhaustive note, (in which, however, the case of Long v. Keightley, 5 Cent. L. J. 80, should have been cited, but is not), the editor discusses the subject of loss of service—the gist of the common law action—both in England and this country. This anomaly of the common law has, we learn from the note, been abolished by statute in Alabama, California, Georgia, Indiana, Iowa, Michigan and Minnesota.

In *Symmes v. Frazier*, 6 Mass. 344, where a reward was offered by public advertisement for the recovery of lost bank bills, it was held that the finder of a part was entitled to a *pro rata* share of the reward offered. This case is relied upon by the Supreme Court of Iowa, in the case of Hawk v. Marion County, published in the present number of the JOURNAL.

Can any one suggest a reason why cases of slander so abound in the old reports? In the present volume there are half a dozen, and in the earlier volumes there were even more, for the first of this series contained not less than seven. And these, it will be remembered, are leading cases in the law; how many more there are in the reports which this series has condensed, the editor, and any one else who cares to investigate them, can only know. In *Logan v. Steele*, 1 Bibb, 593, the words "I have every reason to believe" the plaintiff burned a barn were held to be actionable. The reference in the opinion in this case to Barham's case, 4 Co. 20, illustrates the tendency of the old judges to avert the rigor of the common law as to crimes. There it was held that the words "he burnt my barn" were not actionable, as the words were to be construed in their mildest sense, *i. e.*, as meaning a barn which had no grain in it, the burning of which was a mere trespass, while if it had contained grain, or been a part of the mansion-house, it would have been a felony.

In *Bunn v. Riker*, 4 Johns. 426, the legality of a wager on the event of an election was before the Supreme Court of New York, and that court decided it to be void as against public policy. *Van Vechten v. Hopkins*, 5 Johns. 211, is a leading case on the law of libel, and which, because of its clear exposition of terms, has been indorsed in many subsequent cases. To it, Mr. Proffatt has added one of the most exhaustive notes which this volume contains—a complete monograph on one of the most important questions in the law of libel, viz, the import or effect of the libelous charge. In *Curtis v. Strong*, 4 Day, 51, one Robbins, who had signed a will which was in dispute, was offered as a witness to prove its execution. An objection was made to his admission as a witness, for the reason that he did not believe in the obligation of an oath, and in a future state of rewards and punishments. To prove the truth of this, the testimony of several witnesses was received who proved certain declarations of his on the subject. Robbins was then again offered as a witness to prove that the declarations referred to were never made by him, and that he did believe in the obligation of an oath, but the court refused to allow him to testify. On appeal this ruling was sustained. In Jackson v. Gridley, 18 Johns. 103, this case was highly approved of by the court, Spencer, C. J., say-

ing: "I fully concur in the opinion expressed in Curtis v. Strong, that it would be incongruous to admit a man to his oath to ascertain whether an oath had any binding influence on his conscience."

A devise of an annuity by a testator to his wife "during her widowhood and life," was held in *Parsons v. Winslow*, 6 Mass. 169, so far as the condition was concerned, to be in restraint of marriage, and of no effect. The note to this case contains a discussion of the question of conditions in restraint of marriage, and cites the rather quaint language of Chief Justice Thompson in Com. v. Stauffer, 10 Penn. St. 350, who, by the way, took a somewhat different view of such conditions from that entertained by the Massachusetts Court, just referred to: "It would be extremely difficult to say why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, to use it as a nest to hatch a brood of strangers to his blood."

Watkins v. Baird, 6 Mass. 506, is a leading case on duress by imprisonment, as is *Betts v. Lee*, 5 Johns. 348, on the effect of an alteration of form in property on the right of the owner to reclaim it. The editor's notes to each of these cases are full and satisfactory. These remarks apply also to *Fouville v. Casey*, 1 Murphy, 389, as to sales of property not *in esse;* to *Rickets v. Dickens*, 1 Murphy, 343, as to warranties in deeds; to *Com. v. Searle*, 2 Binney, 332, as to forgery at common law and under statutes; to *Thacher v. Dinsmore*, 5 Mass. 299, as to the personal liability of guardians; to *Bond v. Farnham*, 5 Mass. 170, as to waiver by an indorser of demand and notice; to *Baker v. Wheaton*, 5 Mass. 509, as to the effect of a discharge under the insolvent laws of another state; to *Rogers v. Hurd*, 4 Day, 57, as to the confirmance of a contract made by an infant; to *Belden v. Carter*, 4 Day, 66, as to the delivery of deeds; to *Sands v. Codwise*, 4 Johns. 536, as to fraudulent conveyances; to *Wilkes v. Ferris*, 5 Johns. 335, as to preferences; to *Wilcocks v. Union Ins. Co.*, 2 Binney, 574, as to what constitutes barratry, and to *State v. Owen*, 1 Murphey, 452, as to the description of wounds in an indictment for murder by stabbing.

"It is to be regretted that so wide a difference in the laws of the respective states of the Union, and of the decisions of their courts upon similar subjects exist. It often operates to the detriment of suitors. It is to be hoped that, at some not far distant day, the publication of reports of decisions in the state courts will effect a greater uniformity in law and decision. Until then, nought remains but for each state to promulgate such laws as meet the sense and habits of its own citizens, and for each state judiciary to administer them faithfully." So spake, in an opinion published in this volume, WOODBRIDGE, Chief Justice of the Supreme Court of Vermont at the commencement of this century. The "not far distant day" has arrived this many years, and the name of the reports of decisions in the state courts is legion. But the uniformity in decision has not yet come, and the judge's prophecy is far from realized. Wherefore it is that the work before us has not been too soon commenced; and as each succeeding volume comes from the press, its value and utility become more and more apparent.

POWER OF COUNTY TO OFFER REWARD—DIVISIBILITY OF REWARD.

HAWK v. MARION COUNTY.

Supreme Court of Iowa, June Term (Des Moines), 1878.

HON. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS, " JAMES G. DAY, " JOSEPH M. BECK, " AUSTIN ADAMS, } Associate Justices.

1. THE AUTHORITIES OF A COUNTY have no power to offer a reward for the apprehension of a criminal, such power being only possessed by the governor, on whom it is expressly conferred by statute.

2. THE BOARD OF SUPERVISORS OF A COUNTY may, however, by virtue of their general authority over the property of the county, offer and pay a reward for the recovery of money stolen from the county treasury.

3. WHERE SUCH REWARD HAS BEEN OFFERED, a person who recovers a part only of the money stolen, is entitled to a *pro rata* portion of the reward.

Appeal from Marion District court.

The treasury of the defendant was robbed, and as plaintiff claims a reward was offered by the defendant for the arrest and conviction of the thieves and an additional amount for the recovery of the money stolen. A demurrer to the petition having been sustained the plaintiff appeals.

Geo. W. Seevers and *Bryan & Russell*, for appellant; *Anderson* and *Gamble*, for appellee.

SEEVERS, J., delivered the opinion of the court:

I. The plaintiff claims to have procured the arrest and conviction of one of the thieves, and to have

recovered or given such information as led to the recovery of a portion of the stolen money and claims a *pro rata* share of the reward. This is resisted by the defendant on the ground, the board of supervisors had no power or authority to offer the reward.

There is no statute which expressly or by necessity implication imposes upon counties any duty in respect to the arrest of persons charged with crime. The purposes for which money belonging to a county may be expended are defined in a great measure at least by statute, and the expenditure must be for some legitimate purpose connected with the county government, unless there is a statute authorizing it for a different purpose. The only manner counties can procure means to pay such rewards is by taxation, and the people of one county, as distinguished from the people of the state, have no such especial interest in the arrest and conviction of criminals as will authorize the levy of taxes to pay such an expense in the absence of a statute authorizing or imposing it.

It is the duty primarily of the state to cause the arrest and conviction of criminals, in the performance of which the state makes use of such officers and agencies as it sees proper, and if the general assembly saw proper there is no doubt a duty in respect thereto could be legitimately imposed on counties. But instead of doing so the statute expressly authorizes the governor in certain specified cases to offer a reward for the apprehension of persons charged with the crimes of murder or arson. Code, § 58.

The statute in Maine, as to the power of towns in this respect, is much like ours as to counties, and there also the governor is authorized to offer rewards in certain cases. It was held in Gale v. South Berwick, 51 Maine, 174, that towns in that state had no power to offer rewards for the arrests of criminals. Such seems also to be the rule in Illinois. County of Crawford v. Spenney, 21 Ill. 288. But a contrary rule was adopted in the Borough of York v. Forscht, 23 Penn. St. 391, on the grounds that the burgesses of the Borough were a part of the public police. Janvrin v. Exeter, 48 N. H. 83, is not applicable because the power in that state is confined by statute, and such is true as to Crawshaw v. Roxbury, 7 Gray 374.

But as to the power to offer a reward for the recovery of the money stolen, we think a different rule must prevail and that to this extent the demurrer should have been overruled.

Counties are bodies corporate for civil and political purposes and "may acquire and hold property and make all contracts necessary or expedient for the management, control and improvement of the same." Code § 279. Within the limits conferred by statute, the boards of supervisors have the same authority and power as to counties as that possessed by the general assembly for the state at large, the essential difference being that the constitution of the state is prohibitory, and defines what the general assembly may not do where as to counties the authority of the board of supervisors must be found in the statute in express words or fair implication. Such boards have full control of county property and the care and management thereof. Code § 303, sub. sec. 11. They levy taxes for the purpose of defraying the expenses of the county government and within the maximum fixed by law, they are the exclusive judges of the necessities of the counties in this respect. Code § 796.

Such being their duties by necessary implication, they are authorized, we think, to offer a reward for the recovery of money belonging to their several counties which has been stolen. If they cannot do so then no such power exists. If the stolen money should not be recovered a similar amount must be raised by taxation. Now, if the money can be obtained by offering a reward, the board has not only the power but we think would be remiss in their duty should they fail to do so if such, in their judgment, was the only or better way to recover the money. If no such power exists then if advised that the stolen money was probably on deposit in some distant place they would not have the power to pay the expenses of any one to go to such place, identify the money and return it to the county treasury.

Of necessity it seems to us this power must exist, otherwise when a county treasury is robbed the county authorities must fold their hands and remain passive until the thief repents and voluntarily returns the money, or rely on the exertions of the individual citizen to work and labor for the recovery of the money without hope of pay or pecuniary reward. If the latter discovered the money under such circumstances the temptation to divide with the thief instead of the county would be great.

We have been referred by counsel to Webster Co. v. Taylor, 19 Iowa 119; Soper v. Henry Co., 26 Ib. 264; Reichard v. Warren Co., 31 Ib. 388, and Long v. Boone, 36 Ib. 65. But none of those cases have any application to the case at bar.

II. It is objected that the payment of the reward was conditional on the arrest and conviction of the thieves and the recovery of the *whole* amount of money stolen. Such amount was *about* $12,000 and the reward offered was "five thousand dollars for the arrest and final conviction of the thieves" and "five thousand dollars additional reward will be paid for the recovery of the money." It will be seen the reward offered for the recovery of the money is in no respect conditional on the arrest of the thief. They are wholly separate and distinct, and in this respect entirely different from the terms and conditions upon which the reward was payable in Jones v. Phœnix Bank, 38 N. Y. 228, cited by the appellee.

It is also insisted, as the plaintiff only claims to have recovered or given information which led to the recovery of a portion of the money he is not entitled to recover a *pro rata* share of the reward. In Symmes v. Frazier, 6 Mass. 344, this question is expressly ruled against the appellee. In the present case the amount stolen was uncertain, that is the exact amount we suppose was not known. But concluding it to have been exactly $12,000 the position of the appellee amounts to this: If $11,999 had been recovered no portion of the re-

ward offered was payable as was held in the Massachusetts case cited. We do not think this is a fair construction of the proposition. It was not so understood by the board of supervisors, because they paid a *pro rata* share of the reward for the recovery of another portion of the money than that now sued for.

III. It is insisted the board of supervisors were not in session when the reward was offered or rather when they determined to offer it. But we regard it as too clear for serious controversy that they afterward and while in session ratified and confirmed what had been done.

This they had the power to do. For it was competent for them to ratify and make obligatory from the beginning any act irregularly done, which they as an original proposition had the authority to do.

In consequence of the reward offered, as it sufficiently appears from the petition, the plaintiff accepted the offer and undertook the recovery of the money and after this and perhaps after the plaintiff had done all he claims toward the recovery of the money the acts of ratification took place. But this can make no difference, for both parties were acting in entire good faith, and the plaintiff had given information as he claims which led to the recovery of the money relying as he had the right to do on the good faith of the defendant to pay the reward if he showed himself entitled thereto. The case of Fitch vs Snedaker 38 N. Y. 248 is not in point because in that case the reward was offered to any person who should give information which would lead to the "apprehension and conviction" of the criminal and the plaintiffs had no knowledge of the reward at the time they gave information which led to the arrest, and as to the conviction it was held that one who gave no information until after the arrest was not entitled to the reward. Having determined the board had the requisite power, the amount of the reward in the absence of fraud was wholly within their discretion.

Without enlarging on the question we are of the opinion the matters stated in the petition entitle plaintiff to recover. Whether he gave information as to entitle him to the reward is a question for the jury under the instructions of the court.

REVERSED

RIGHT OF TENANT TO REMOVE TRADE FIXTURES.

WATRISS v. FIRST NATIONAL BANK.

Supreme Judicial Court of Massachusetts—January Term, 1878.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

WHERE a tenant continues in possession under a new ease, containing diff erent terms and conditions from those in the prior lease, making no reference to such lease, and reserving no rights to him in trade fixtures, annexed during the previous term and not removed before its expiration, he has no right to remove such fixtures during the new term.

Action of contract, in which the plaintiff claims to recover damages for a breach of covenant, contained in an indenture of lease, for the return of the demised premises at the end of the term in good order and condition, etc. The breach complained of was the taking down and removal of a fire-proof safe and vault, and also a furnace with pipes and flues, and also certain counters. The defendants answered that the articles removed were their own property.

It appeared that the plaintiff and one Hyde, as tenants in common, owned certain real estate and buildings thereon in Cambridge, and by a lease dated Jan. 1, 1861, demised the premises described in the declaration to the Harvard Bank for the term of five years. The lessees thereupon constructed in the building a fire-proof safe or vault, for the safe-keeping of money, books and securities; also a portable furnace in the basement, with the necessary pipes, flues and registers for warming their rooms, and also certain counters; and the premises were occupied by the lessees as their banking-rooms. Before the expiration of the term, viz, May 16, 1864, the lessees were organized as a national bank under the laws of the United States, and their name was changed to the First National Bank of Cambridge, but there was no other change in their identity. Their lease contained a clause giving to the lessees the privilege, at their option, of renewing and extending their enjoyment of the premises for the additional term of five years, upon the same terms. In the course of the term a partition was duly had between Hyde and the plaintiff, by virtue of which the plaintiff became the sole owner of the demised premises. Before the expiration of the term the bank elected to continue to hold under the lease for the five additional years. Before the expiration of the additional five years a new lease was executed between these parties, dated October 7, 1870, granting to the defendants a further term of five years from the first day of January, 1871. On or about November 5, 1875, the defendants removed to another building, taking down and removing the articles above mentioned.

ENDICOTT, J., delivered the opinion of the court:

It is stated in the report that the Harvard Bank. soon after taking possession of the premises under the lease of January 1, 1861, put in a counter, a portable furnace with its necessary connections, and a fire-proof safe or vault, for the removal of which, in 1875, this action is brought. In 1864 the Harvard Bank was organized as the First National Bank of Cambridge. No question is made that all the proceedings were according to law. The right to the personal property of the old bank passed therefore to the defendant, upon the execution of the necessary papers and the approval of the proper officers; no other assignment was necessary. Atlantic National Bank v. Harris, 118 Mass. 147, 151.

The right of the defendant to occupy the premises under the lease to the Harvard Bank for five

years, and to exercise the option contained in the lease to hold the premises for five years more at the same rent, seems to have been conceded by the lessors, for the defendant continued in possession, paying rent during the whole term of ten years contemplated by the lease, which expired January 1, 1871. We must assume that the title not merely to movable chattels upon the premises, but also to trade fixtures put in by the Harvard Bank, passed to the defendant, as the plaintiff does not deny that the defendant could have removed such of the articles as are trade fixtures at any time before the final expiration of the lease, on January 1, 1871.

In October, 1870, about three months before the final expiration of the term of the old lease, the plaintiff, one of the original lessors, who had in the meantime acquired the whole title to the premises, executed a new lease to the defendant, then in occupation, for a much higher rent, containing different stipulations from those in the old lease, particularly in regard to abatement of rent in case of fire. This lease was to take effect January 1, 1871, but made no reference to the existing lease, or to the removal of any trade fixtures then upon the premises. It was in no proper sense a renewal of the old lease. It contained the usual covenants on the part of the lessee to quit and deliver up the premises at the end of the term in as good order and condition "as the same now are." Although executed before the expiration of the earlier lease, it can have no other or different effect than if given on the day it was to become operative, and its stipulations and conditions are to be considered as if made on that day. And the question arises whether the acceptance of the new lease, and occupation under it January 1, 1871, was equivalent to a surrender of the premises to the lessor at the expiration of the first term. If it did amount to a surrender, it is very clear that the defendant could not afterwards recover the articles alleged to be trade fixtures.

The general rule is well settled that trade fixtures become annexed to the real estate, but the tenant may remove them during his term; and if he fails to do so, he can not afterwards claim them against the owner of the land. Poole's case, 1 Salk. 368; Gaffield v. Hapgood, 17 Pick. 192; Winslow v. Merchants Ins. Co., 4 Met. 306, 311; Jacob v. Spaulding, 4 Met. 416; Bliss v. Whitney, 9 Allen, 114, 115, and cases cited; Talbot v. Whipple, 14 Allen, 177; Lyde v. Russell, 1 B. & A. 394; Baron Parke, in Minshall v. Lloyd, 2 M. & W. 450. This rule always applies where the term is of a certain duration, as under a lease for a term of years, which contains no special provisions in regard to fixtures. But where the term is uncertain, or depends upon a contingency, as where a party is in as tenant for life or at will, fixtures may be removed within a reasonable time after the tenancy is determined. Ellis v. Page, 1 Pick. 43, 49; Doty v. Gorham, 5 Pick. 487, 490; Martin v. Roe, 7 E. & B. 237. See Whiting v. Brastow, 4 Pick. 310, 311 and note.

There is another class of cases which form an exception to the general rule. Where a lease was given by an agent without sufficient authority, during the absence of the owner, and was terminated by the owner on his return from abroad, it was decided by this court that the lessees became tenants at sufferance, and could remove their fixtures within a reasonable time after such termination. Antoine v. Belknap, 102 Mass. 193. In Penton v. Robart, 2 East, 88, it was held that a tenant who had remained in possession after the expiration of the term had a right to take away his fixtures, and Lord Kenyon said: "He was in fact still in possession of the freehold at the time when the things were taken away, and there was no pretence to say that he had abandoned his right to them." In Weeton v. Woodcock, 7 M. & W. 14, a term under a lease had been forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignee to enforce the forfeiture, and it was held that they might have a reasonable time to remove fixtures. And Mr. Baron Alderson said, "that the tenant's right to remove fixtures continues during the original term, and during such further period of possession as he holds the premises under a right still to consider himself as tenant."

Mr. Justice Willes, commenting on these two last cases in Leader v. Hornewood, 5 C. B. N. S. 446, said: "It is perhaps not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of the term, and so become a tenant at sufferance, in severing fixtures during the time he continues in possession as such tenant." But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff, viz: that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures. In Mackintosh v. Trotter, 3 M. & W. 184, Baron Parke, after stating that whatever is planted in the soil belongs to the soil, remarked "that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered an excrescence of the term." He also refers to Minshall v. Lloyd, 2 M. & W. 450, as authority, wherein he stated in the most emphatic manner, that "the right of a tenant is only to remove, during his term, the fixtures he may have put up, and so make them cease to be any longer fixtures." It is clear from these cases that the right of a tenant in possession after the end of his term to remove fixtures within a reasonable time, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still in, in contemplation of law as tenant under the original lease, as Baron Parke says, under what may be considered an excrescence of the term, that is, as tenant at sufferance.

But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition. This is not the extension of

or holding over under an existing lease; it is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease, must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture, under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and the fixtures annexed which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old.

This view is supported by the authorities. The earliest case on the subject is Fitzherbert v. Shaw, 1 H. Black. 258. A purchaser of lands, having brought ejectment against a tenant from year to year, the parties entered into an agreement that judgment should be signed for the plaintiff with a stay of execution for a given period, and it was held that the tenant could not, during the interval, remove the fixtures erected during the term and before action brought, on the ground that the tenant could do no act to alter the premises in the meantime, but they must be delivered up in the same situation they were in when the agreement was made and the judgment signed. This case was followed in Heap v. Barton, 12 C. B. N. S. 274, where there was a similar agreement, and Jervis, C. J., said: "that if the tenants meant to avail themselves of their continuance in possession, they should have said so." In Thresher v. Proprietors of the East London Water Works, 2 B. & C. 608, it was held that a lessee who had erected fixtures for purposes of trade on the premises, and afterwards took a new lease to commence at the expiration of the former one, which contained a covenant to repair, would be bound to repair the fixtures unless strong circumstances are shown that they were not intended to pass under the general words of the second demise; and a doubt was expressed whether any circumstances, *dehors* the deed, can be alleged to show that they were not intended to pass.

The case of Shepard v. Spaulding, 4 Met. 416, touches the question. A lessee erected a building on the demises premises, which he had a right to remove but surrendered his interest to the lessor without reservation; afterwards he took another lease of the premises from the same lessor, but it was held that his right to remove did not revive. When the new lease was made, it was of the whole estate including the building. This differs from the case at bar only in the fact that there was an interval between the surrender of the interest under the first lease and the granting of the second when the lessor was in actual possession. But the acceptance of the new lease and occupation under it are equivalent to a surrender of the premises at the end of the term. In Loughran v. Ross, 45 N. Y. 792, it was held that if a tenant, having a right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right to removal is lost, notwithstanding his occupation has been continuous. See Abell v. Williams, 3 Daly, 17; Merritt v. Judd, 14 Cal. 49; Ingerman v. Bovei, 19 Cal. 354; Taylor on Landlord and Tenant, § 550; Elwes v. Mawe, 3 East 38; 2 Smith's L. C., 7 Am. Ed. 228, 245, 257.

We are therefore of the opinion that the defendant had no right to remove any trade fixtures during the second term placed there during the first. If any of the articles named were movable chattels, as the defendant contends, the plaintiff cannot recover for them, but if they were permanent or trade fixtures, the plaintiff may recover for their removal.

Case to stand for trial.

EXEMPLARY DAMAGES — CONDUCT OF TRIAL—REMARKS OF COUNSEL.

BROWN v. SWINEFORD.

Supreme Court of Wisconsin, January Term, 1878

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, " WM. P. LYON, " DAVID TAYLOR, " HARLOW S. ORTON, } Associate Justices.

1. CONSTITUTIONALITY OF PUNITIVE DAMAGES.—An award of punitive damages for a tort which is also punishable as a crime, is not in violation of the constitutional provision that no person, for the same offense shall be twice put in jeopardy of punishment; and the rule allowing such damages should not now be abrogated or modified in this state, except by legislation. Provocation of an assault, though not sufficient for justification, may go to exclude exemplary damages.

2. REMARKS OF COUNSEL WHEN GROUND FOR REVERSAL.—If counsel, against objection, persevere in arguing to the jury upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, this, on exceptions duly taken, may be good ground for a new trial, or for a reversal; and the judgment herein is reversed on such ground.

3. A WAIVER OF THE OPENING ARGUMENT to the jury, by the plaintiff's counsel, if it leaves him the closing argument at all, confines it to a strict reply; but *quære*, whether a mere violation of this rule, excepted to, would be sufficient to reverse a judgment.

4. AN INDECENT EXPOSURE, PERMITTED on the trial, censured by the court.

Action to recover damages for injuries inflicted on the plaintiff by the defendant. On the 19th of July, 1876, the plaintiff, a resident of Baraboo, Sauk county, was on the platform of the Northwestern Railroad Company's station at that place, without, as it appears from the evidence, having any business there. The defendant, the superintendent of the railroad, drove up to the platform in a carriage and seeing a crowd of men on the platform ordered them to leave. Nearly all of them obeyed, but the plaintiff refused, and accompanied

his refusal with an obscene epithet. The defendant thereupon went up to the plaintiff and a scuffle ensued in which the injuries complained of were received. The evidence was conflicting as to the number of blows struck and as to whether the plaintiff struck the defendant.

The complaint alleges that on the 19th of July, 1876, at Baraboo, Sauk county, the defendant without any cause or provocation whatever, with force and arms, assaulted the said plaintiff and with great force and violence struck him three fearful and dangerous blows upon the head, over and above the right eye, and then and there gave and struck the plaintiff a great many other very violent blows upon the head, breast, and other parts of the body, and also then and there with great force and violence shook and pulled about the said plaintiff and threw him upon the sidewalk, and also then and there jumped upon and kicked the plaintiff in his private parts, greatly injuring one of his testicles, and then and there gave and struck the plaintiff many other severe and dangerous blows and strokes. The answer of the defendant denies that the plaintiff had sustained anything more than nominal damages, and alleged that the assault was provoked by the language and conduct of the plaintiff, and that whatever trespasses the defendant committed were done suddenly and in the heat of passion, wrongfully aroused by the plaintiff.

On the trial the defendant's counsel excepted, amongst others, to the fourth instruction given to the court which, was: "4th. If the injury was inflicted by defendant upon the person of the plaintiff under circumstances of aggravation, insult or contumely, with vindictiveness, wantonness or malice on the defendant's part, the jury are authorized to impose damages over and above those heretofore indicated, which are denominated actual or compensatory damages, as a punishment to defendant and as a warning and example to himself and others. These are what are denominated punitory or exemplary damages."

Counsel on the part of the plaintiff waived his opening argument to the jury, and notwithstanding a notice to him by the defendant's counsel that he should insist that in his closing argument to the jury he should keep within the record, and that if he went outside of that the defendant should take exception, remarked to the jury: "The defendant, Swineford, has the use of the Chicago & Northwestern Railroad to carry his witnesses to and from Sparta. He issued passes to his witnesses, while poor Brown was obliged to pay the fare of each and every witness he had." The defendant's counsel objecting to these remarks the court ordered the counsel to confine himself to the evidence. Afterwards the plaintiff's counsel resumed his remarks to the jury, and said: "Well, there is evidence that he is superintendent of the railroad, and this very afternoon a special train left this village for the sole purpose of carrying the defendant's witnesses to their homes; and if Swineford has power to send special trains wherever he wants to, I guess he has power to issue passes. I don't think there will be much doubt of that." To which remarks of counsel and want of action on the part of the court in not preventing them, counsel for the defendant did then and there except. After, and notwithstanding the aforesaid objection of defendant's counsel and the admonition and ruling of the court that the counsel should confine himself to a fair discussion of the evidence and keep within the record, the plaintiff's counsel in a subsequent part of his argument to the jury commented to the jury upon the connection of the defendant, Swineford, with the railroad company, upon the superior power, wealth and influence as compared with the plaintiff, of the said company as a great corporation, and the defendant's ability, on account of his connection therewith, to pay any judgment that might be rendered against him in the action.

The jury rendered a verdict in favor of the plaintiff for $750. Defendant appeals.

Appeal from the Circuit Court of Monroe County.

W. F. Vilas and *C. C. Remington*, for appellant; *Chas. R. Gill* and *R. M. Bashford*, for respondent.

RYAN, C. J., delivered the opinion of the court:

The court would be wanting in self-respect to decide this appeal without some word of censure for an indecency committed on the trial. During his examination as a witness, the respondent was permitted, without apparent objection by court or counsel, to uncover and exhibit to the jury his organs of generation. No such indecency is ever necessary, or should be tolerated in any court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it. Such an exposure as was made in this case, if made without leave of the court, might well be punished as a contempt; made with the sanction of the court, it is none the less improper and indecent, well calculated to disgrace the administration of justice and to bring it into ridicule, if not into contempt. It is hoped that this court may never have another occasion for such censure.

A very able and solemn appeal was made to the court, to exclude the rule of exemplary damages in actions of tort, when the tort is punishable as a crime. The position was founded upon the clause in sec. 8, art. 2 of the constitution, that no person, for the same offense, shall be twice put in jeopardy of punishment. It was argued with very great force that punitory damages, given in the right of the public, in addition to full compensation of the sufferer by an act which is at once a tort and a crime, as in this case, and in McWilliams v. Bragg, 3 Wis. 424, and Birchard v. Booth, 4 Wis. 67, subjects the tort-feasor to punishment twice for the same offense. And it might have been added that, while the statute limits the pecuniary fine upon criminal prosecution for such an act, there is but vague limit to the punitory damages which a jury may find in a civil action. It certainly appears to be an incongruity, that one may be punished by the public for crime upon criminal prosecution, by fine limited by statute, and again punished in favor of the sufferer, but in right of the public, for the

same act, by punitory damages, with little limit but the discretion of a jury. This is but another illustration of what appears to be the incongruity of the entire rule of exemplary damages.

On this subject the writer adheres to what he said in Bass v. Railway Co., 42 Wis. 672, confirmed by comments which he has seen upon it in legal periodicals. And he believes that his views of punitory damages, as an original question, are sanctioned by every present member of the court.

The particular view of the rule now insisted on was overlooked in McWilliams v. Bragg, Birchard v. Booth, and all the cases in this court, in which the action was against the actual tort-feasor, subject to the criminal conviction for the act. In Railroad Co. v. Finney, 10 Wis. 388; Bass v. Railway Co., 36 Wis. 450, s. c. 42 Wis. 654; Craker v. Railway Co., 36 Wis. 657, and other cases where the action was against the master for the tort of the servant, it could not well arise. So far, therefore, it is a question of first impression here; and the court congratulates itself that it arises first in a case thoroughly discussed by able counsel on both sides.

It would have been no subject of regret to the court if the obligation of the constitution called upon it to abridge the application of the rule. But the court is unable to hold that the constitutional provision has any controlling bearing on the question. The constitution only re-enacts what was the general, if not literally universal, rule at common law. See authorities collected in 1 Bishop Crim. Law, secs. 980-987. The word *jeopardy* is therefore used in the constitution in its defined, techical sense at the common law. And in this use it is applied only to strictly criminal prosecutions by indictment, information or otherwise. Commonwealth v. Cook, 6 Ser. & R. 577; State v. McKee, 1 Bailey, 651; People v. Goodwin, 18 Johns, 187; U. S. v. Gilbert, 2 Sumner, 19; U. S. v. Haskell, 4 Wash. 402. See also State v. Crane, 4 Wis. 400. The cases generally hold that the rule in criminal cases, that one shall not twice be put in jeopardy, implies more than a bar of a judgment to an action for the same cause. But no case is known where a conviction upon an indictment has been held a bar to a civil action for damages growing out of the same act; *a fortiori*, none in which a recovery in a civil action has been held a bar to an indictment for the same act. And the whole purview of section 8 plainly shows that the putting in jeopardy prohibited is confined to criminal prosecutions. Indeed, this is manifest in the clause itself, which is confined to the same *offense*, used in the same sense as *criminal offense*, in the first clause of the section. Of course the same act may be an offense (in the sense of crime) against the state, and an offense (in the sense of tort) against a private person. It is manifest that judgment for the one is not a bar to the other. And it might be difficult, in principle, to hold a criminal conviction as a bar to the recovery of punitory damages in a civil action, and not a bar to the recovery of compensatory damages; not a bar to any civil action. See Jacks v. Bell, 3 C. & P. 316.

The radical difficulty in the position of counsel appears to be, that judgment for the criminal offense is for the offense against the public; judgment for the tort is for the offense against the private sufferer; that though punitory damages go in the right of the public for example, they do not go by way of public punishment, but by way of private damages for the act as a tort, and not as a crime, to the private sufferer and not to the state. Though they are allowed beyond compensation of the private sufferer, they still go to him for himself, as damages allowed to him by law in addition to his actual damages; like the double and treble damages sometimes allowed by statute. Considered as strictly punitory, the damages are for the punishment of the private tort, not of the public crime. It is unfortunate that damages should ever have been suffered to go beyond actual compensation, under a liberal rule like that given in Craker v. Railway Co., 36 Wis. 657. But the rule so long and so generally established is a sin against sound judicial principle, not against the constitution.

And so the constitutional provision makes no exception to the rule of exemplary damages, although it adds great force to the weight of argument against the soundness of the rule generally.

A different view appears to prevail elsewhere. Fay v. Parker, 53 N. H. 342. This is certainly, as an editor of Professor Greenleaf's work remarks, a very elaborate and able discussion of the subject; it is a very elaborate and able criticism of the cases sustaining the rule of punitory damages, and argument against the rule in any case. To the same effect are Taber v. Hutson, 5 Ind. 322; Butle v. Mercer, 14 Ind. 479; Nossaman v. Rickert, 18 Ind. 350; Humphries v. Johnson, 20 Ind. 190; Austin v. Wilson, 4 Cush. 275. But these cases fail to satisfy this court that it is wrong in the construction here given to the constitutional provision in question. And Chiles v. Drake, 2 Met. (Ky.) 146, and Hendrickson v. Kingsbury, 21 Iowa, 379, well considered cases, in very satisfactory discussions, come to the same conclusion as this court, and strongly confirm it.

The argument and consideration of this case have gone to confirm the present members of this court in their disapprobation of the rule of exemplary damages which they have inherited. But they fear to complicate the difficulties and incongruities of the rule by the exception urged, and do not feel at liberty to change or modify the rule at so late a day, against the general authority elsewhere. As suggested in Bass v. Railway Co., if a change should now be made, it lies with the legislature rather than the court, to abrogate or modify a rule running through the entire body of the reports of this state. As was once well observed, courts can not be always inquiring into the original justice or wisdom of rules long established and accepted.

After all, the distinction between compensatory damages for wounded feelings, sense of insult, etc. and punitory damages, is something very vague, as may be seen by comparison of Wilson v. Young, 31 Wis. 574, and Craker v. Railway Co., 36 Wis. 657. And the vagueness of this distinction, in practice as well as in theory, is illustrated by three reports

of Bass v. Railway Co., 36 Wis. 450; 39 Wis. 636; 42 Wis. 654. The case was three times tried, in different counties—twice upon instructions allowing exemplary damages, and once upon instructions disallowing them. And yet, the verdict on each trial was for the same sum. Apparently, what was allowed on two trials for exemplary damages, was allowed on the third trial for compensatory damages for wounded feelings, etc.

The charge of the court below in this case, on the subject of exemplary damages, was correct as far as it goes; though it can hardly be held sufficiently explicit in such a case, in view of some of the evidence appearing in the bill of exceptions. In Morely v. Dunbar, 24 Wis. 183, it was held that provocation of an assault, although not sufficient for justification, might mitigate even compensatory damages, clearly implying that it might exclude exemplary damages. In Wilson v. Young, 31 Wis. 574, it was held by a majority of the court that provocation could go to reduce compensatory damages, only so far as these should be given for injury to the feelings. Dixon, C. J., adhered to the rule in Morely v. Dunbar, that provocation, in proper cases, might go to reduce all compensatory damages. Whichever of these cases should be followed, it is quite clear that both hold that provocation may go to exclude exemplary damages. In such a case it is malice against malice; the malice of the plaintiff precluding him from recovery for the malice of the defendant, provoked by his own. See Johnson v. McKee, 27 Mich. 471.

Following for once a bad practice, the learned counsel for the respondent, in closing the argument of the case to the jury, forgot himself so far as to exceed the limits of professional freedom of discussion.

It appears by the bill of exceptions, that he waived the opening argument to the jury. A very strict rule might hold this to give the other side the right to close. If such a waiver should still leave the closing argument to the plaintiff, it certainly confined it to a strict reply to the defendant's argument, excluding general discussion of the case. The sole object of all argument is the elucidation of the truth, greatly aided in matters of fact, as well as in matters of law, by full and fair forensic discussion. And this is always imperilled when either party, by any practice, is able to present his views of the case to the jury, without opportunity of the other to comment on them. And if the party entitled to the opening argument, relying on the strength of his case without discussion, waives the right to open, he waives the right to discuss the case generally, and should not be permitted to do so out of his order, and after the mouth of the other party is closed. His close, if permitted to close the argument, should be limited to comments on the argument of the other side. This is essential to the fairness and usefulness of judicial discussion at the bar.

It sufficiently appears in the present case, that the learned counsel for the plaintiff did not properly confine his closing argument to a reply. It is very doubtful if that alone would be error sufficient to reverse the judgment, if an exception had been taken by the appellant, which does not appear to be the case. But the learned counsel went beyond the legitimate scope of all argument, by stating and commenting on facts not in evidence.

In actions of tort, calling for exemplary damages, evidence of the pecuniary ability of the defendant to pay them is admissible. Birchard v. Booth, *supra;* Barnes v. Martin, 15 Wis. 240. This appears to be, as Mr. Justice Cole remarks in Birchard v. Booth, a fair corollary of the rule of exemplary damages. Perhaps the corollary is not better founded in principle than the rule, but the court takes them as it finds them established.

It appeared in evidence, that the appellant was an officer of a railroad company, and that the *locus in quo* was within depot grounds of the company. No evidence appears to have been given of the ability of the appellant to pay exemplary damages. The learned counsel appears to have undertaken to supply this want of evidence, by commenting to the jury upon the appellant's connection with the railroad company, and the wealth and power of the company as a great corporation, and the defendant's ability, from his connection with it, to pay any judgment which might be rendered against him. The bill of exceptions states, that "no record was kept of these remarks, and the court is unable to state more specifically the substance of language used." But enough appears to show, not only that the learned counsel commented on facts not in evidence, but in effect testified to the facts himself. It was in effect telling the jury that the appellant's position with the corporation gave him the ability to pay large damages, and nearly—if not quite—that they might measure the damages by the wealth of the railroad company itself.

Amongst other evidence of the appellant's ability to pay, it might undoubtedly have been shown that he received large emoluments from his position in the railroad company; and possibly that the railroad company had assumed the appellant's tort and the payment of the judgment. And it was not the duty or the right of counsel, was not within the proper scope of professional discussion, to assume the facts as proven, or to state them to the jury as existing; founding his argument *pro tanto* upon them. And this was the more marked in the present case, because it was made for the first time in what should have been a mere reply; and still more, because the court below had already admonished counsel to confine himself to the evidence, and not to go outside of the record.

The appellant took his exception; and his counsel now supports it by numerous cases, some of which are—as far as they go—admirable discussions of professional ethics, and all of which are well worth the attention of the bar. All of them support the rule now adopted by this court, that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume *arguendo* such facts to be in the case, when they are not. Some of the cases go further, and reverse judgments for imputation by counsel of facts not pertinent to the issue, but calculated to preju-

dice the case. Tucker v. Henniker, 41 N. H. 317; State v. Smith, 75 N. C. 306; Ferguson v. State, 49 Ind. 33; Hennies v. Vogel, Sup. Court Ill., 7 Cent. L. J. 18.

There are cases in conflict with those which support this rule. But, in the judgment of this court, the rule is supported by the weight of authority and by principle.

Doubtless the circuit court can, as it did in this case, charge the jury to disregard all statements of fact not in evidence. But it is not so certain that a jury will do so. Verdicts are too often found against evidence and without evidence, to warrant so great a reliance on the discrimination of juries. And, without notes of the evidence, it may be often difficult for juries to discriminate between the statements of fact by counsel, following the evidence and outside of it. It is sufficient that the extra-professional statements of counsel may gravely prejudice the jury and affect the verdict.

The profession of the law is instituted for the administration of justice. The duties of the bench and bar differ in kind, not in purpose. The duties of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at the best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but a method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore is it that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of a client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to prejudices, just or unjust, against his adversary *dehors* the very case he has to try. The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit court, in jury trials, to interfere in all proper cases, of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court.

It is with regret that the court is obliged to hold that both appear to have been done in this case. It was no fair inference for argument that, because the appellant was the servant of a wealthy railroad company, he himself was wealthy; or that the jury might take into consideration, in assessing damages, the power, wealth, and influence, of the corporation. Popular prejudice against great corporations is, perhaps, a sufficient difficulty in the way of the administration of justice, in cases in which such corporations themselves are parties; it is intolerable that it should be extended to their servants. For all that appears in this case, the appellant may be as poor as Job in his downfall. His wealth, if he had it, was legitimate subject of evidence; not legitimate subject of argument, without evidence. And his fortune or misfortune in being the servant of a corporation was legitimate ground for no appeal against him in a court of justice.

It is to the honor of the bar that this is the first time this question has come before this court. Yet it is not to be ignored that the practice here condemned has sometimes been indulged in. And it is, perhaps, not to be regretted that the question has first come here in the case of an eminent member of the bar; a gentleman of high character, personal and professional, known to every member of this court; whose professional ability needs no adventitious aid, and who probably fell into this error casually and inadvertently. His professional standing shields him from personal censure, while it will give emphasis to the rule laid down.

The judgment is reversed, and the cause remanded to the court below for a new trial.

NOTES OF RECENT DECISIONS.

MASTER AND SERVANT—NEGLIGENCE—FELLOW-SERVANTS.—*Mobile & Mont. R. R. v. Smith.* Supreme Court of Alabama, 6 Rep. 264. Opinion by MANNING, J.—1. An employer is not liable to an employee for an injury caused by the the fault or negligence of a co-employee, unless chargeable with blame for having employed as such co-employee a person incompetent and unfit for the duties assigned to him. 2. In an action against an employer for injuries caused by a co-employee, the onus of proving negligence is on the injured servant. 3. The general superintendent or manager of a railroad company, in the performance of a duty incumbent on him as one of its skilled servants, is a common employee with a brakeman of the road, as is also the supervisor of the road, an engineer, and a section-master.

MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE.—*Flickenger v. Wagner.* Court of Appeals of Maryland, 6 Rep. 269. Opinion by ROBINSON, J.—1. In order to constitute reasonable and probable cause, in a case of malicious prosecution for an arrest, the facts and circumstances must be such as not only to create a bare suspicion, but must be sufficiently strong to satisfy a cautious man that the party is guilty of the charge. 2.

It is necessary in such a case for the plaintiff to prove that defendant was actuated by malice and without probable cause. 3. Where the circumstances are such as to constitute a reasonable cause, the motive which actuates the party making an arrest is immaterial. 4. The fact that defendant had the charge (of perjury) dismissed is not of itself sufficient to prove that he had not probable cause for instituting the prosecution.

CRIMINAL LAW—TRIAL—SWEARING JURY—PRESENCE OF DEFENDANT—WITNESS—SUBPŒNA—RAPE KNOWLEDGE.—*Lawrence v. Com.* Court of Appeals of Virginia, 6 Rep. 285. Opinion by MONCURE, P.—In a criminal case, where the accused is attended by counsel, it will be presumed that irregularities did not occur in the proceedings, in the absence from the record of exceptions to such alleged irregularities. 2. It is not necessary that the form of the oath taken by the jury should be copied in the record; it is sufficient that it appears the jury were duly sworn. 3. It must appear on the record that the person tried for felony was personally present during the trial. The statement in the record, at the conclusion of the proceedings of any one day, that the prisoner was thereupon remanded to jail, shows that he was personally present during all the proceedings had in the case on that day. 4. It is not an objection to a witness for the prosecution that his name does not appear at the foot of the indictment, or that he had not been summoned, or that no notice was given the accused of an intention to examine him. 5. The offence of having carnal connection with a female under twelve years of age is entirely independent of her consent, or of any statement of hers in regard to her age or any belief on the part of the accused as to her age.

RAILROADS—CONSEQUENTIAL DAMAGES OCCASIONED BY CONSTRUCTION OF WORKS.—*Struthers v. Dunkirk, W. & Pitts. R. R.* Supreme Court of Pennsylvania, 9 Pitts L. J. 5. Opinion by PAXSON, J.—1. A common law action does not lie against a corporation for consequential injuries occasioned by the construction and operation of its works. 2. A railroad company may use a public street or highway for its roads when authorized by its charter to do so. "At the time the defendant's road was being constructed, the plaintiff had erected and nearly completed, at considerable expense, a handsome dwelling house on his said premises, and brought this action of trespass on the case to recover damages for the inconvenience and annoyance occasioned by the building and operating of the road immediately in front of his residence. The pleadings are not given, but we gather from the charge of the court that the annoyance caused by the passage of trains, the cinders and smoke, and the hindrance to the passage of carriages, were the chief matters of complaint. However considerable these annoyances may be they do not constitute a cause of action. There is no principle of law better settled in Pennyslvania than that a common law action does not lie against a corporation for consequential injuries occasioned by the construction and operating of its works: Monongahela Nav. Co. v. Coons, 6 W & S. 101; Henry v. Bridge Co. 8 W. & S. 85: N. Y. & E. R. R. Co. v. Young, 9 Casey, 175; O'Connor v. City of Pittsburgh, 6 Har. 187; Watson v. Pitt. & Conn. R. R., 1 Wright, 469; Cleveland & Pitt. R. R. Co. v. Speer, 6 P. F. Smith, 325; West Branch Canal Co v. Muelinor, 18 P. F. Smith, 357. It is equally clear that a railroad company may use a public street or highway for its road when authorized by its charter to do so. Phil. & Tren. R. R. Co., 3 Wharton, 25; Mifflin v. R. R. Co., 4 Har. 182; Mercer v. Pitts., F. W. & C. R. R. Co., 12 Casey, 99; Com. v. Erie & N. R. R. Co. 3 Casey, 339. There is only one question remaining in the case, and that is, whether the court below should have received evidence to show that the company might have located its road upon another route, and thus have avoided laying the track upon High street. We are clearly of opinion that the learned judge was right in excluding evidence of this character, and also in his answers to the points in which the same question was presented. The discretion of the company in the location of its road cannot be reviewed in this manner. The location was made in the exercise of an undoubted power. It was said in Parke's Appeal, 14 P. F. S. 137: 'Neither the court below nor this court has any right to interfere with the location made by the company on the score of preference, if any be felt. The only question is, whether it has or has not exceeded a discretion on the subject apparent on the face of the act of incorporation." See, also, N. Y. & E. R. R Co. v. Young, 9 Casey, 175, and Cleveland & Pitt. R. R. Co. v. Speer, *supra.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF IOWA.

June Term (Des Moines), 1878,

Hon. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS, } Associate Justices.
" JAMES G. DAY, }
" JOSEPH M. BECK, }
" AUSTIN ADAMS, }

PRACTICE—JURISDICTION—SERVICE BY PUBLICATION.—Under the statute providing for service by publication, "In actions brought against non-residents, * * *" the action must have been fully "brought" before publication of the notice, and where, in an attachment proceeding, the petition was filed and attachment issued thereon after the publication of the original notice: *Held*, that the court did not acquire jurisdiction of the property attached. Opinion by ROTHROCK, C. J.—*Billings v. Kothe.*

CORPORATIONS—POWER TO CONTRACT DEBTS.—1. A corporation is estopped to set up as a defense to a debt which was authorized to be contracted by an amendment to its articles of incorporation, that the amendment was not recorded at the time the debt was contracted. 2. A private corporation which is authorized, by its articles of incorporation, to contract debts to a certain amount, can not escape the payment of a debt contracted for a valid and sufficient consideration, on the ground that its indebtedness exceeds the limits fixed. There is a distinction in this respect between private and municipal corporations. Opinion by ADAMS, J.—*Humphery v. Patrons Mercantile Association.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NORTH CAROLINA.

June Term, 1878.

HON. W. N. H. SMITH, Chief Justice.
" EDWIN G. READE, } Associate Justices.
" W. B. RODMAN, }
" W. P. BYNUM, }
" W. T. FAIRCLOTH, }

CONSTITUTIONAL LAW—MARRIED WOMAN'S PROPERTY—ADMINISTRATION.—Where the marriage was before the adoption of the constitution, but property is acquired by the wife *since* its adoption, such subsequently-acquired property is governed by the provisions of the constitution, and is the separate property of the wife. A husband who administers on such

property must administer the assets according to law; and no off-sets of debts, due by the husband individually, can be allowed in an action by him as administrator to recover the property. Opinion by READE, J.—*Holliday v. McMillan.*

TENANCY IN COMMON—APPEAL—CONTRACT TO SELL—SPECIFIC PERFORMANCE.—One tenant in common can not sell the land of another, and it follows that he has no authority to make an admission the effect of which, if received in evidence against the other, will be to enlarge or vary the boundaries of a piece of land which they had previously sold, and thus in effect to sell land without authority in writing. This is an exception to the rule that one person jointly interested may bind another by his admissions. It is not the duty of a court of appeals to put its decision entirely on some small error of the court below, and thereupon send the case back, thus protracting litigation; but it should, if possible, pass on some vital question and arrest the litigation, or when that is not possible, it may explain what are the decisive questions in the cause, so the parties may direct their attention to them. Where a contract to sell and convey land was executed in 1841, the plaintiff who has only an equitable estate, and brought this action of ejectment before 1868, can, notwithstanding, file a supplemental complaint for specific performance in the present action, and the superior court, on proper proof, will direct a conveyance of the legal title by the party contracting to sell, and in the meantime enjoin all persons having, or claiming, the legal title in privity with him, from setting it up against the plaintiff. This is not opposed to the rule laid down in Gaither v. Gibson, 63 N. C. 93, but is the doctrine of that case applied where the equitable owner is the plaintiff. Opinion by RODMAN, J.—*Young v. Griffith.*

VERDICT OF ACQUITTAL OBTAINED BY FRAUD—MANDAMUS TO ANNUL VERDICT.—This was an application for a mandamus to amend the record to the end that a verdict of acquittal might be reviewed and annulled, and the defendant again put on trial based on the petition of the solicitor duly sworn to, in substance, as follows: That at October Term, 1874, of the Superior Court of Wake county, an indictment for conspiracy and cheating, by false pretenses, was pending against the defendant and Littlefield, on which a capias was issued but not executed at the commencement of April Term, 1875. The omission to execute it on defendant Swepson was by the direction of the solicitor. Littlefield could not be found. The state had retained counsel to aid the solicitor. At some time during said term in the absence of the counsel so retained, the counsel for Swepson moved for a verdict of not guilty, on the ground, as he alleged, that the action had been compromised. The defendant had been arrested that day under an order made that day by the judge without the knowledge of the solicitor, but was not present in court. The motion was opposed by the solicitor, but the judge ordered a jury to be impanelled, and a verdict of not guilty to be entered, which was done. The state was not ready for trial, and its material witnesses were not present, and no witnesses for the state were examined. The appeal was asked for in behalf of the state, which was refused. The counsel for the state then proposed a statement of the facts above stated, and requested the judge to have the same made part of the record, which he also refused. *Held*: The jurisdiction of the supreme court is wholly appellate. It has no original jurisdiction to require a superior court to put an acquitted person again on trial, or to inquire whether or not the acquittal was procured by his fraud. The motion is refused. 2. Such a verdict of acquittal on an indictment for *misdemeanor* is a nullity, and the person acquitted by such means may be tried again for the offense of which he was thus acquitted. 3. A solicitor may with, and perhaps without the consent of the judge, cause a defendant to be again arrested and put on trial on the old bill, or if not barred by the statute of limitations, send a new bill and proceed on it, disregarding the former verdict and judgment as nullities. In either case, the defendant may plead the former acquittal, to which the solicitor may reply that it was procured by the fraud of the defendant, and thus raise an issue of fact to be tried by a jury. This doctrine is limited to misdemeanors, and does not apply to capital cases and felonies. Opinion by RODMAN, J.—*State v. Swepson.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Springfield, June 24, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER.
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

ASSUMPSIT—NOTE—VARIANCE—ABSTRACT REQUIRED BY SUPREME COURT.—This was assumpsit by appellee against appellant. The declaration contained a special count on a promissory note and the common money counts. The issue was tried by the court. Appellee proved the execution of a promissory note to himself, and the court, over appellant's objection, admitted it in evidence. Judgment was given in favor of plaintiff. The only objection raised is that the court erred in admitting the note in evidence, on the ground that there was a variance between the note given in evidence and that described in the first count. SCHOLFIELD, C. J., says: "We fail to discern any valid objection to the admissibility of the evidence under the common money (2d) count. The execution of the note having been first proved, it was sufficient evidence to authorize a recovery under these counts without proof of a consideration. 33 Ill. 372; 52 Ill. 205. Nor does the fact that the promissory note is not the same that is described in the special count affect its admissibility as evidence under the common money counts. 16 Ill. 269; 19 Ill. 167; 26 Ill. 200." The court has this also to say in reference to the filing of abstract required by them: "This case ought to have been affirmed solely on the ground that appellant failed to comply with the rule of the court in regard to making abstract, but inasmuch as the record is very short and but a single point involving no controversy of fact is presented, we have thought the omission may have been the result of inadvertence and have, in consequence, considered the case upon its merits." Affirmed.—*Boxberger v. Scott.*

EVIDENCE—PASSAGE OF ORDINANCE—JOURNAL OF TOWN TRUSTEES.—This was a prosecution against the appellant for the violation of an alleged ordinance of the village of Auburn, prohibiting the sale of intoxicating liquors, resulting in his conviction. Upon this appeal the only question presented is whether the evidence shows that the ordinance under which appellant was convicted was not legally adopted. *Prima facie* evidence was given of the passage of the ordinance. The journal of the proceedings of the board of trustees of the village was also in evidence, which showed that at a meeting of such board "on motion of A the following ordinance (the one in question) was unanimously adopted," and this is all the journal

shows of the manner in which the ordinance was passed. The point made is that the journal does not show that the yeas and nays were taken upon the passage of the ordinance and the entry thereof on the journal (as the statute reads); that it is an imperative requirement of the statute that the yeas and nays shall be called and entered on the journal, and that the same is essential to the validity of the ordinance, referring to Spangler v. Jacoby, 14 Ill. 297, where, in respect to a similar constitutional provision, it was held that such directions were mandatory. SHELDON, J. says: "The purpose of the requirement that the vote should be entered on the journal was that it might appear thereby whether the ordinance was passed by the majority required by the statute. It was admitted here at the trial that the board of trustees of the village was composed of six members. The journal shows that only one member was absent from the meeting when the ordinance unanimously passed, and hence it appears on the face of the journal that the ordinance passed with the concurrence of a majority of the members. This, we think, is the essential thing, and we are inclined to hold that the showing of the journal is sufficient in this regard, and hence that the journal itself does not rebut the *prima facie* proof made." Affirmed.—*Barr v. Village of Auburn.*

PROCESS — SERVICE OF SUMMONS — "PERSON OF THE FAMILY."—This was a suit to foreclose a mortgage. No appearance being entered at the term, to which the summons was returnable, a decree passed against both defendants, John J. and Elizabeth Wells, and the property was sold by the master in chancery. At the succeeding term Elizabeth Wells, one of the defendants, entered a motion to set aside the sale, and to vacate the decree of foreclosure as to her, because she had never been served with process, and had not, therefore, appeared to defend the cause. The court overruled the motion and complainant appeals. The principal question in the case is whether the service was defective. The officer returned the summons, endorsed that he had served it by reading it to John J. Wells, "and delivered to him a true copy of the writ, and also by leaving with him, at her usual place of abode, a true copy of this writ, for Elizabeth Wells, his wife, he being over ten years old, and explaining the same to him." SCOTT, J., who delivered the opinion, says: "We find the return of service as to plaintiff in error was defective in not stating that the copy of the summons left for her was left with a 'person of the family' with defendant. *Non constat*, her husband may not have been living separate and apart from her, and only temporarily at 'her usual place of abode.' There having been no such service of the summons upon plaintiff in error as the statute requires, and there having been no appearance on her behalf, the decree of forceclosure against her upon default, was clearly erroneous." Reversed.—*Wells v. Stumph.*

LIABILITY OF PARENT FOR NECESSARIES FURNISHED TO MINOR—SUBSEQUENT PROMISE.—This action was brought to recover a balance claimed to be due for clothing sold a minor son of defendant by the plaintiff. Judgment went for plaintiff in the lower court and defendant appeals. At the time the goods were purchesed the son was residing with his parents, and, so far as was shown he was furnished with clothing suitable to his condition in life; the father did not consent to the purchaser nor did he have any knowledge concerning the transaction until the goods were brought home. CRAIG J. says: "Where the father has supplied his minor son with neccessaries or is ready to supply them, he cannot be bound by a contract which the son may make with a third party although the goods purchased may be regarded as neccessaries. The plaintiff however contends that defendant became bound for the payment of the goods by what occurred subsequent to the purchase. After the goods were bought the son being allowed to retain them without objection, the defendant as the plaintiff testified promised to pay for the goods. From these facts we are inclined to hold the jury was justified in finding for plaintiff. Parsons on Contracts vol. 1 p. 301 says: 'The authority of the infant to bind the father by contracts for necessities is inferred, both in England and this country from very slight evidence." In Hunt v. Thompson, 3 Scam. 179 it was held that an express promise or circumstance from which a promise by the father can be inferred is indispensably neccessary to bind the parent for neccessaties furnished his infant child by a third person."—Affirmed. *Johnson v. Smallwood.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

January Term, 1878.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, }
" WM. P. LYON, } Associate Justices.
" DAVID TAYLOR, }
" HARLOW S. ORTON, }

FIRE INSURANCE — APPLICATION — WARRANTY — WATCHMAN.—In the written application for insurance of a mill against fire, the applicant, in answering the questions whether the mill was ever left alone, and whether there was a watchman in it during the night, said: "No regular watchman, but one or two hands sleep in the mill." By a stipulation in the same instrument, the applicant "warrants, covenants and agrees to and with" the insurer, that his statements therein are "a full, true, and just exposition of all the facts and circumstances, condition, situation and value of the property," and are "offered as a basis of the insurance requested," and are "made a special warranty," etc. The policy stipulated that it should be avoided by any false representation by the assured of the condition, situation and occupancy of the property, or any omission to make known every fact material to the risk. *Held*, that in view of these stipulations, the answer above recited was an express *warranty* by the assured that one or two of his employees lodged in the mill each night; and was also a promissory and continuing undertaking, which bound him to a substantial compliance with its terms during the life of the policy. 2. After stating that the lubricating oil used in the mill was whale oil, the applicant, by the printed form of the application, was asked to agree, and did agree, that no lubricating oil should be used which was "mixed with or composed of petroleum, or any kind of earth or coal oils." *Held*, that this addition of an express promise as to the future use of oil, will not prevent the answer above recited touching a watchman, from being regarded as a promissory undertaking. [3 LYON, J., is of opinion that if the statement as to watchmen be regarded as merely a *representation*, and not a warranty, it was still promissory and continuing, and a failure to keep it good, material to the risk, would defeat a recovery on the policy.] 4. Where delivery of a policy is prevented by failure of the assured to pay the premium, the application for such policy and its delivery are regarded in law as contemporaneous acts; and warranties in the application, or representations therein material to the risk, must at least be true *at the time of such delivery*, or they will avoid the policy. 5. The application was made December 3d, and, from delay of the applicant to pay the premium,

the policy was not delivered until December 28th; no employee of the assured lodged in the mill at night after December 25th; and the mill was destroyed by fire several weeks later. *Held*, that there can be no recovery on the policy. The mere fact that the assured did not see the policy before he paid the premium is immaterial. Opinion by LYON, J. TAYLOR, J., dissenting.—*Blumer v. Phœnix Ins. Co.*

PAYMENT OF PART OF CLAIM PENDING ACTION.—1. Payment, pending an action, of *part* of the claim therein sued upon, does not deprive plaintiff of his right to recover the remainder. 2. Thus, in replevin by a town treasurer for a chattel levied upon by him to raise a tax, and taken from him by defendant, (where plaintiff had acquired possession of the chattel under the statute), payment of the tax and return of the chattel by plaintiff to defendant, did not preclude a recovery by plaintiff of damages for the detention, *with costs of the action*, although such damages were merely nominal. 3. The exclusion of a record offered in evidence to show the pendency of a former suit for the same cause between the same parties (alleged in the answer), cannot be reviewed in this court in the absence of anything in the bill of exceptions to show the contents of such record.—Opinion by COLE, J. *Thomas v. Wiesman.*

LIFE INSURANCE — FORFEITURE — WAIVER.—1. There is nothing in the charter or constitution of the defendant which renders inapplicable to it the doctrine of waiver applicable to other insurance companies, 2. Forfeitures are not favored in the law; and the benevolent object of the order for whose benefit the defendant company was organized, with the provisions of defendant's constitution and by-laws indicating a purpose to mitigate forfeitures, requires the court to lay hold of any act showing an intention of defendant to waive the forfeiture in this case. 3. The right to payment of a certain sum by defendant as insurance on a life was forfeited in case the assured at his death had not paid all assessments; but, after his death, all assessments against him were paid for him in pursuance of authority granted and a request made during his lifetime, and were by his lodge (which was defendant's agent for that purpose) received and forwarded to defendant, and by it accepted and retained until after commencement of this suit, with knowledge of the death of the assured on the part of the lodge and the defendant at the times of such receipt and acceptance. *Held*, that the forfeiture was waived. Opinion by COLE, J. *Erdmann v. Mutual Ins. Co.*

PASSAGE OF LAWS—EVIDENCE—POWER OF MUNICIPALITIES TO ISSUE BONDS.—1. The publication of an act in the bound volumes of session laws of the year in which it purports to have been approved, verified by the secretary of state, creates a presumption that it became a law pursuant to the requirements of the constitution. 2. Where the journal of a branch of the legislature, published as required by the constitution, gives a list of the numbers and titles of numerous bills in immediate succession, followed by the words, "*was* read a third time," etc.: *Held*, that the word "was" is an obvious clerical error for "were," and the journal is evidence that *all* the bills named in such list were read a third time. 3. A statute will be so construed, if possible, as to reconcile it to the constitution. 4. Ch. 126 of 1869 (as amended by ch. 31 of 1871) provides that the proper officers of any county through which a certain railroad shall run, etc., may levy a tax and issue bonds of the county to aid in the construction of any portion of such road, and for the purchase of right of way and depot grounds, "upon such terms and conditions as shall be agreed upon" between such county and the railroad company (sec. 1); that when the company shall require aid from any county, it shall make a written proposition, stating (among other things) "the terms, conditions *and considerations*" upon which the money or bonds of the county will be required to be paid and delivered to the company (sec. 2); and that all shares of the *capital stock, or bonds or other securities* given by the railroad company to any county, may be taken, held, sold, etc., by such county in the same manner and with like effect as can be done by individuals (sec. 7). *Held*, (1.) That, construing the statute together, it requires by its terms, some "consideration" moving from the railroad company to the municipality voting aid. (2.) That the power of granting aid by the issue of municipal bonds "on such terms, conditions and considerations" as the municipality and the railroad company may agree upon, must be understood of *lawful* terms and considerations—such a power as may be exercised by a municipality within the limits of the constitution; and the act itself, and bonds issued under it by a municipality, to pay for stock subscribed in aid of a railroad, are held valid. [RYAN, C. J., acquiescing in the judgment on other grounds, dissents as to the last point, holding: 1. That municipalities in this state can take power to levy taxes in aid of railroads owned by private corporations, only by way of becoming stockholders therein. Whiting v. Railroad Co., 25 Wis. 167. 2. That a legislative grant of power for either of two purposes, at the election of the grantee, one purpose being lawful and the other unlawful, is void. Attorney-General v. Eau Claire, 37 Wis. 400. 3. That the act can not be construed as limiting the power of taxation conferred, to payment for a stock subscription, or as limiting it at all except by requiring *some* consideration from the company; and it is therefore void, and bonds issued under it, though in fact for stock subscriptions, invalid.] Opinion by COLE, J.—*Bound v. Wisconsin Cent. R. R.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1878.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY,
} Associate Justices.

EVIDENCE—CONTRACT WITH COUNTY CAN NOT BE SHOWN BY PAROL—NO RIGHT OF ACTION ARISES FROM VOID CONTRACT OF COUNTY COURT.—Plaintiff, under contract with county court, prepared a book for entry of satisfaction of judgments that had been rendered in circuit court of county, from 1841 to 1871, and entered therein satisfaction of all judgments that had been paid and satisfied, as shown by executions and other evidence on file in office of circuit clerk. The book was received by county court, is now a record in circuit clerk's office, and the county court had paid part of contract price, but refused to pay balance of the claim presented against the county, in the county court thereof. Plaintiff appealed to circuit court. The records of the county court showed no such contract as alleged, and showed no order to do work sued for. Plaintiff offered parol evidence showing the contract between the county court and himself, which, against objection, was admitted, and judgment entered for plaintiff for amount of his claim, from which county appealed. *Held* (1.) That parol evidence, as to alleged contract with county court, was improperly admitted. A county court, like any other of record, can only speak by its records, and the statute (1 Wag. St. 419, sec. 5) expressly requires that such courts "keep just

and faithful records of their proceedings." The correct principle that parol evidence was inadmissible to prove a contract with the county court, was announced at an early day in this state. Medlin v. Platte Co., 8 Mo. 235; Milan v. Pemberton Co., 12 Mo. 598. It has been thought that the case of Boggs v. Caldwell Co. 28 Mo. 586, enunciates a different doctrine. But that case proceeded on ground that the formality of entering an order of record was unnecessary, when relating to "books in the office" of the clerk. Authority of that case has been doubted in Reppy v. Jefferson Co. 47 Mo. 66, and the only proper course to pursue is, in every instance, to let the record speak the only utterances of the court entitled to recognition. Dennison v. Co. of St. Louis., 33 Mo. 168. (2.) It does not help plaintiff's case that county court paid a portion of sum verbally agreed upon, nor that work thus agreed upon was afterwards finished. Wolcott v. Lawrence Co., 26 Mo. 272. (3.) The work bargained for was wholly unauthorized by law, so far as the county court was concerned. That court possesses no supervisory control over clerks of the circuit court. Their duties, in respect to the judgment docket, are prescribed by statute (1 W. S. 793, sec. 27) and satisfaction of judgments are to be entered at the instance, and paid for by the party interested. 1 Wag. St. sec. 24, 792-3, sec. 10, p. 623. As the work to be done was wholly unauthorized to be contracted for by the county court, no cause of action accrued to plaintiff therefor. Reversed and remanded. Opinion by SHERWOOD, C. J.—*Maupin v. Franklin Co.*

PRACTICE—WHEN CAUSE IS REMANDED BY SUPREME COURT WITH SPECIFIC DIRECTONS NEW TRIAL ON MERITS CAN NOT BE HAD.—This case was here before (55 Mo. 264), and the judgment was reversed and the cause remanded, with directions to the trial court in its further proceedings, to take an account of rents and profits, etc., etc., and that plaintiff be restrained from taking possession until she should pay value of improvements and purchase-money, diminished by rents and profits. These directions were fully followed by court below, and judgment rendered accordingly. *Held*, under these directions plaintiff was not entitled to open the case and have a new trial. These views are sustained by the case of State *ex rel* Allen v. St. Louis Circuit Ct. 41 Mo. 574, and Knealy v. Macklin, decided October term, 1878, and not yet reported. Had the judgment been simply reversed and the cause remanded, a different phase of the case would have been presented. Affirmed. Opinion by SHERWOOD, C. J. —*Shidyer v. Nickell.*

PLEADING — PETITION FOR DOUBLE DAMAGES UNDER 43D SECTION CONCERNING RAILROADS MUST STATE STATUTORY ESSENTIALS.—This was an action under the 43d section of the corporation act (1 Wag. St. p. 310) to recover double damages for killing stock, the property of plaintiff, by a train of cars running over defendant's road. Verdict against defendant for $100, and judgment for plaintiff for double that amount. A motion in arrest, on ground that petition did not state facts sufficient to constitute a cause of action. *Held*, (1.) That as petition did not allege that at the place where the cattle were killed, the road ran through "unenclosed prairie lands," and did not allege that the injury to the cattle was occasioned by the failure of the company to erect and maintain a fence, as required by the 43d section, the omission of these allegations was fatal. Cecil v. Pac. R. R. Co., 47 Mo. 247. (2.) Having sued under the 43d section, plaintiff must recover, if at all, under that section. He can not recover under the 5th section of the Damage Act, or on a cause of action at common law, on a petition based upon the 43d section. He must lie in the bed he makes for himself. Wood v. St. L., K. C. & N. R. W. Co., 58 Mo. 109; Cary v. Same, 60 Mo. 209; and Edwards v. H. & St. Jo. R. R. Co., decided at last term. Reversed and remanded. Opinion by HENRY, J.—*Luckie v. C. & A. R. R. Co.*

HOMESTEAD EXEMPTION—DOES NOT EXTEND TO PROCEEDS OF SALE UNDER EXECUTION OR DEED OF TRUST.—C, holding a judgment against P, had execution levied upon an eighty acre tract of land, the property of P, upon which, with his family, he resided. Land was sold under the execution, and purchased by C, in February, 1876. P made a deed of trust on same land in favor of D & T, who, in January, 1876, had the land sold by trustee. D & T purchased at trustee's sale, and, after satisfying their debt, they owed a balance of $299 of the purchase money. C had garnishment served upon D & T in order to subject this sum to payment of balance of his judgment. P interpleaded, claiming the money under the Homestead Act, and D & T answered, setting up foregoing facts, and alleging that C had no right to the money unless he relinquished his claim under the execution sale. When execution was levied P did not designate, under section 2 of the Homestead Act, the part to which the exemption should apply. Nor did the sheriff set the same apart as therein provided. *Held*, (1.) The homestead is a statutory right, a strictly legal right, and while the act should be liberally construed, yet equitable principles, other than those recognized by the act, can not be invoked by one claiming a homestead right. P having voluntarily conveyed land in which he had a homestead right, the money realized by the sale under that conveyance, can not be treated as land, much less as a homestead. It is "the dwelling house and land, rents, issues and profits" which are exempt, and nothing else. There is nothing in the act protecting the *proceeds* of the sale of a homestead against creditors' demands, except as provided in secs. 9, 10 and 11, and the provisions for setting out homesteads by metes and bounds and to sever the same from other real estate, forbid the idea of a homestead exemption in anything but real estate. (2.) The garnishees D & T had no right to the money as against C, notwithstanding C bought the same land under his execution and claimed title to it. The $299 belonged to P, and C had the same right that any other judgment creditor would have on garnishment proceedings to recover the money from the garnishees. Affirmed. Opinion by HENRY, J.—*Casebolt v. Donaldson.*

INJUNCTION-BOND—DAMAGES MUST BE ADJUDGED BEFORE ACTION CAN BE MAINTAINED AGAINST SURETIES.—This was an action on a statutory injunction-bond. It appears from the petition that no damages were assessed on the dissolution of the injunction. Demurrer to petition sustained, and plaintiff appealed. *Held*, there can be no breach of the bond, until a failure or refusal to pay whatever sums of money shall have been adjudged against the plaintiff. While the bond is required to be for a sum sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by the injunction (Sec. 11, 2 Wag. Stat. 1030); yet the condition of the bond restricts this general language to a liability on the part of the sureties "to pay all sums of money, damages and costs that may be adjudged against the plaintiff." This view is strengthened by Sec. 14 of the act, which requires the court, on dissolution of injunction, to enter judgment against the obligors in the bond, according to the circumstances of the case. The "damages must be adjudged," and the non-payment of the amount adjudged forms the breach of the bond so far as damages are concerned. Kennedy's Admr. v. Hammond, 16 Mo. 341; Corder v. Martin, 17 Mo. 41. Affirmed. Opinion by HENRY, J.—*Dorris v. Carter.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1878.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

ACTION OF FORCIBLE DETAINER—SHERIFF'S DEED—CONFIRMATION—DELIVERY—EVIDENCE.—1. In an action of forcible detainer, the plaintiff offered in evidence a sheriff's deed, from which he claimed title to the premises in dispute, dated July 13th, 1374, and the journal entry of the confirmation of the sheriff's sale of the date of July 16th, 1874, together with the testimony of the clerk of the district court, and the sheriff who executed the deed, that the deed was not executed till after the confirmation of the sheriff's sale, and thereupon the defendant moved the court to strike out the sheriff's deed, for the reason that the records of the court introduced in evidence showed that there never was any confirmation of the sheriff's sale prior to the date of the execution of the deed. The court sustained the motion and a demurrer to the evidence of the plaintiff: *Held*, error, as the evidence, under proper instructions, should have been submitted to the jury. 2. Ordinarily the date of a deed, (admitted to have been delivered) is *prima facie* evidence of the time of its delivery, but this presumption may be rebutted by testimony, and where a sheriff's deed is dated three days prior to the date of confirmation of the sale therein recited, but is not delivered till after such confirmation, the deed is not void. Opinion by HORTON, C. J. Reversed. All the justices concurring.—*Cain v. Robinson.*

TAX DEED—DEFECTIVE RECORD OF TAX PROCEEDINGS—MANDAMUS.—1. When a tax deed has been issued, which is void upon its face as showing the county to have been a competitive bidder, and the purchaser at the tax sale, the party entitled may, if the sale was in fact valid, and that fact is apparent from the record of tax sales and the sale certificate, compel by *mandamus* the issue of a valid tax deed. Clipplinger v. Fuller, 10 Kan. 377. 2. Before the *mandamus* will lie, the clerk must, after demand therefor, have refused to execute such deed. 3. Where the record of tax sales and the sale certificate show upon their face a sale not made in accordance with law, the clerk is concluded by the recitals therein, and is not at liberty to take parol testimony as to the actual facts of the sale, and such record and sale certificate must be corrected by appropriate proceedings before *mandamus* will lie to compel him to issue a valid tax deed. Opinion by BREWER, J. All the justices concurring.—*Bryson v. Spaulding.*

BANKS—CORPORATION DE FACTO—EVIDENCE—VARIANCE—DISCOUNTING—POWER TO PURCHASE NOTES.—1. Article 13, of the State Constitution, entitled "Banks and Currency," applies to banks of issue and does not prohibit the legislature from creating banks of deposit and discount. 2. Where there is a general law under which an incorporation can be had, an incorporation attempted in good faith to be made thereunder by the requisite number of corporators, and where, in reliance upon such supposed perfect compliance with the statute in all the steps prescribed for the organization, there is an actual, open and notorious exercise for a series of years, unchallenged by the state, of the powers of a corporation, public policy will not permit one who has frequently dealt with it as a corporation when sued upon a note purchased and held by such supposed corporation, and which, as a corporation, it might rightfully purchase and hold, to defeat the action by showing a technical omission in some of the proceedings prescribed for the organization of incorporations. The corporation is as to him one *de facto*, and whether it be one also *de jure* is a question not open for inquiry in that collateral manner. 3. *Quere:* Was not section 30 of the corporation law intended as a substitute for section 6, so far as the incorporation of savings associations is concerned? 4. A petition was filed in the name of the "Capitol Bank of Topeka." The certificate of incorporation offered in evidence showed that the name selected for the association was the "Capitol Bank," and that its prescribed place of business was Topeka. *Held*, that the variance was too slight to be regarded as a defense to the action and any needed amendment will be considered made. 5. Under the general power of discounting negotiable notes, granted by section 127 of the corporation law to savings associations, such institutions have the power to purchase such notes. Opinion by BREWER, J. Affirmed. All the justices concurring.—*Pape v. Capitol Bank.*

DEPOSITION—PRACTICE—IMPEACHMENT OF WITNESS—INSTRUCTIONS—POSSESSION OF REAL ESTATE—CONSTRUCTIVE NOTICE OF TITLE.—1. Where a plaintiff makes a general objection and exception to a deposition to the effect that it is incompetent and irrelevant, and a large portion of the testimony is clearly admissible against the party excepting, and the portion of the deposition which is incompetent only effects a co-plaintiff, who takes no exception, and the deposition is admitted in evidence and read to the jury: *Held:* no cause for reversing the judgment obtained in the action. 2. Where the deposition of a witness has been read in evidence, and the opposing party produces another and a conflicting deposition of the same witness, taken in another action between the same parties, of a prior date, and offers to introduce the same to impeach the witness, and the court of its own motion excludes the testimony: *Held*, not error, as the witness sought to be impeached, and the party to be affected thereby, are entitled of right to any explanation which the witness can give of the statements imputed to him; and, therefore, the attention of the witness must be first called, on cross-examination, to such prior contradictory statements. 3. Where a party requests the court to instruct the jury that if a particular witness (naming him) has knowingly and willfully testified falsly in regard to any material fact in the case, they must entirely disregard the testimony of the witness, and the court modifies the instruction to include all the witnesses, and then gives the same, and thereafter, the party asking the instructions alleges the court committed error in giving instructions thus modified: *Held*, that, as the instruction is virtually in accord with the request of the party alleging error, the giving of the same is not sufficient reason to reverse the judgment. K. P. R. W. Co. v. Cutter, 19 Kan. 83. 4. Where a defendant purchased real estate July 4th, 1859, and obtained a deed of that date, and thereafter has open, notorious and exclusive possession of the premises, but fails to record his deed till August 20th, 1859, a plaintiff, buying the property August 16, 1859, and recording his deed the same day, has notice of the title and interest of the defendant to the property of which he is in full possession at the date of plaintiff's purchase, and, *Held*, that the plaintiff, by his subsequent purchase, obtains no title which he can assert against the defendant in possession of the premises. Johnson v. Clark, 18 Kan. 157; School District No. 82 v. Taylor, 18 Kan. 287. Opinion by HORTON, C. J. Affirmed. All the justices concurring.—*Greer v. Higgins.*

REPLEVIN—LAND CONTRACT—A HOUSE A CHAT-

TEL.—1. Where A enters into a written contract to sell a certain piece of land to C, and this contract contemplates that C shall take possession of the land, build a residence thereon, and make other improvements thereon, and that all such improvements shall remain on the land until all the terms and conditions of the contract shall be complied with and fulfilled, and that if all such terms or conditions should be fulfilled, then that the contract should be at an end, and that all the improvements made on the land should remain thereon and be the property of the realty; and C assigns said contract and all his rights thereunder to D, and D builds a dwelling house on said land and resides therein, and said dwelling house is a one-story frame building, about 16 by 24 feet in size, and is set upon ten blocks of wood, the highest one being about one foot, so that said house almost touches the ground on one side, and is about one foot from the ground on the other side, and afterwards D removes said house into the highway adjoining the land, and then assigns said contract and all his right thereunder to R, and at the same time sells said house to B for $200, to be paid in one year, and B then removes said house to his own land, and places it on permanent stone foundation, intending to make the house a part of his real estate, and to make it his own. The terms and conditions of said contract were not fulfilled, but were violated before the removal of said house from the land of A, and also by such removal. *Held*, that said house, while it was on the land of A, was real estate and belonged to A, subject to said contract; that when it was removed into the highway it became personal property of A and belonged absolutely to him; and that after it was removed from the highway and placed upon a permanent stone foundation on B's land, it still remained the personal property of A, and did not become a part of the real estate of B. 2. When a house, which is a chattel and belongs to A, is wrongfully removed on to a permanent stone foundation on the land of B, B intending at the time to convert the house into real estate and to make it his own, and the house is one that can easily be removed from the land of B, without any substantial injury to either the house or the land: *Held*, that such house does not thereby become a part of the realty belonging to B, but remains merely a chattel belonging to A, and that A may recover the same in an action of replevin. Opinion by VALENTINE, J. Reversed. All the justices concurring.—*C. B. U. P. R. R. v. Fritz.*

HOMESTEAD—DISTRIBUTION.—1. Where V. and wife occupied certain real estate as a homestead at the time of V.'s death, and the children of V. were all of age, and none of them occupied the residence of the intestate at his death, nor thereafter, but the widow continued to occupy it as her home after the decease of her husband: *Held*, that the premises are the absolute property of the widow and children, and the children, being all of age, are entitled to have the premises partitioned, one-half in value to go to the widow, and the other one-half in value to go to the children. If the homestead is not susceptible of division, the same may be sold and the proceeds divided. Opinion by HORTON, C. J. Reversed. All the justices concurring.—*Vandweir v. Vndweir*

CORPORATION DE FACTO—STOCK LAW OF 1874—DEMAND.—1. A corporation which has the possession, control and management, and is engaged in the business of running and operating a railroad in this state, is a "railway corporation" within chapter 94 of the laws of 1874, although it is so doing in the execution and discharge of a trust for the benefit of the bond and stockholders of the corporation which built and owned the road, and it is not itself the absolute owner thereof. 2. A demand under that act is sufficient, if made upon one who is the "stock and claim adjuster, and authorized to settle for stock killed." Opinion by BREWER, J. Affirmed. All the justices concurring.—*Union Trust Co. v. Kendall.*

MANDAMUS—JUDICIAL PROCEEDINGS.—1. An information was filed in the Probate Court alleging insanity of a certain person. Upon this an order was entered in which the court, after reciting the filing of the information, states that it appears from its own records that prior proceedings had been had by which said person had once been adjudged insane, and still remained under said adjudication, and therefore the inquiry prayed for is refused. *Held*, that whether the decision of the Probate Court was right or wrong was a question which could not be enquired into on *mandamus*, and that the probate court having acted in the premises and refused the application, could not be compelled by *mandamus* to reverse its decision and institute the inquiry prayed for. Opinion by BREWER, J. Judgment for respondent. All the justices concurring.—*State v. Norton.*

LEGISLATURE — QUALIFICATION OF MEMBERS — RIGHT OF REMOVAL OF MEMBERS.—1. A member of the legislature can not be removed from office under chapter 122 of the laws of 1875. 2. The exclusive power to judge of the qualifications of its own members is vested in each house, and can not by its own consent, or by legislative action, be vested in any other tribunal or officer. 3. This power is not exhausted by the admission of a member to his seat, but continues during the entire term of office. Opinion by BREWER, J. Judgment for defendant. All the justices concurring. —*State v. Gilmore.*

FRAUDULENT CONVEYANCE—POWER AND RIGHTS OF ADMINISTRATORS.—1. When a person conveys personal property with the intention of defrauding his creditors, the conveyance is good and binding as against him and his representatives, including his agents, executors, administrators and heirs, and is void only as against his creditors whom he intended to defraud. 2. Where a person loaning money, took the note and mortgage given for the money, in his son's name, and gave them to his son for the purpose of defrauding his creditors: *Held*, that the administrator for such person can not, after his death, maintain an action against the son to recover said note and mortgage and to restrain the son from collecting the same, even though the estate may be insolvent; that only the creditors of the deceased can mantain an action against the son to deprive him of the benefit of said note and mortgage, and they can do it only for the purpose of subjecting the same to the payment of their claims against the deceased. Opinion by VALENTINE, J. Affirmed. All the justices concurring.— *Loomis v. Crawford.*

QUERIES AND ANSWERS.

QUERIES.

60. IN THE BLANK FORMS OF PROMISSORY NOTES, the following clauses frequently occur: "Waiving all right to exemption and homestead laws"; "Without exemption from appraisement, valuation or homestead laws." Do the above create a legal waiver? Y.

De Soto, Mo.

[This question is governed to a great extent by the language of the homestead laws themselves. Our correspondent is referred to Mr. Thompson's work on "Homesteads and Exemptions."—ED. CENT. L. J.]

ANSWERS.

No. 54.

[7 Cent. L. J. 179.]

B's remedy is properly against C, by bill to foreclose, in which all the grantors and grantees should be made parties defendant. B, on filing his bill to foreclose, first discovered that, by mutual mistake of the parties, the description in the mortgage did not embrace the land or lot intended to be mortgaged, and which neither A nor B owned, or claimed to own. In the case of Davenport v. Sovil, 6 Ohio St. 459, it was held that parol proof is competent to establish such mistake, and that the mortgage may be reformed and enforced in the same proceeding. Such, also, are the opinions of those eminent chancellors, Kent and Story, 2 Johns., Ch. 585; 4 Ib. 44, Story's Equity Juris., sec. 154. This decision is approved and followed in the case of Goshorn v. Purcell, 11 Ohio St. 641, in which the court say: "The court has the same power to correct the mistake, whether the defect is in the execution or in the body of the instrument—whether the mistake is that of the parties or of an officer in taking or certifying the acknowledgment." 11 Ohio St. 641. The circuit court erred in refusing to reform the mortgage executed by C to B. F first discovered the error when he sold and conveyed to G, but concealed the fact and conveyed lot 20, to which he had no legal title, instead of instituting proceedings to reform his title. I, having derived title to lot 20 through F, could only acquire such title as F possessed; and if he suffered loss by the reforming of B's mortgage, his remedy would be against F for a breach of covenant in conveying lands to which he held no title. D.

BOOK NOTICE.

THE CODE OF CIVIL PROCEDURE of the State of Iowa, with references to the decisions of the Supreme Court and prior Statutes. Compiled by J. S. STACY, Attorney at law. Des Moines, Ia. Mills & Co., 1878.

This is a compilation which will prove of great value to the profession in Iowa. It gives, in a compact form, the statutes relating to procedure in Iowa, as adopted by the fourteenth general assembly, and as amended by the fifteenth, sixteenth and seventeenth general assemblies, with references under each section to prior statutes, and the decisions of the supreme court made thereunder. Two editions of the work have been issued, one in the usual law-book size, with a wide margin for annotations, and the other, the one before us, in a pocket form similar to Desty's Federal Procedure, so well known to the profession. The arrangement is excellent, and the printing and binding are of the best kind. The index is more thorough than usual in works of this kind, and deserves particular mention.

NOTES.

SIDNEY BREESE.

First Nature gave to him a dowery grand—
  Health, strength and grace, of body, mind and soul;
Then Culture came, and with most cunning hand,
  Polished and wrought to one harmonious whole.
  Mounted, he swept Life's course from goal to goal;
A Counselor, replete with legal lore—
  A Soldier, taking rank on Honor's roll;
A Statesman, searching far his country o'er,
That freedom, health and peace obtain from shore to shore.

A Scholar, garnering fruit from every field—
  A Patron, seeking modest worth to praise;
A Justice, holding balance, sword and shield,
  All wrongs to heal, the prostrate poor to raise,
  Bating, or giving, as the Right displays;
Thus filling full Heaven's generous span of years,
  'Tis ours to crown with honorable bays;
'Tis ours to mingle our memorial tears,
As he ascends from earth to nobler, happier, spheres.

[EDMUND S. HOLBROOK, of the Chicago Bar.

CHIEF JUSTICE HORTON, of Kansas, has been renominated for another term.——J. G. Dickerson, one of the associate justices of the Supreme Court of Maine, died at Belfast in that state, on the 1st inst., in his sixty-fifth year.——T. Bradford Dwight died at Andover, Mass., on the 1st inst. He was born at Portland, Me., in 1837, and after graduating at Yale College was admitted to the bar of Philadelphia in 1862. He was for a short time a judge of the Orphans Court of Philadelphia——It is scarcely necessary to refer at length to the event of the week in this city, viz: the opening of the St. Louis Fair and Exposition. This is the eighteenth annual fair, and promises, both in the number of entries and the variety of attractions, to eclipse all former ones. It will last until October 12th. In addition to the exposition proper, each week is given up to competitions of different kinds, which will be in themselves more than admirably interesting. The first week will be devoted to contests between the military companies of this and other cities. The second is the muscians' week. The third week will be taken up with trials of agricultural implements and machinery; the fourth with athletic sports and contests, and from the 7th of October to the close of the fair the exhibition of live stock will take place. We would remind the profession that the exposition opens before the lawyers' vacation ends, and we have no doubt that many of our subscribers in this and other states will take advantage of the occasion to see a sight which only one city in the Union can present.——The London *Times* contains the following with respect to the Congress of the International Association for the Reform and Codification of the International Law, at Frankfort-on-the-Main. The congress has adopted a resolution, proposed by Herr Marcus, of Bremen, approving the decision taken at Berne establishing a uniform railway goods tariff. Mr. Freeland, who was supported by Mr. Peabody of the United States, spoke, amid general assent, in terms of approval of the new relations promoted in London by the Chinese and Japanese Ambassadors, both in the domain of political economy and international law. The congress unanimously adopted a resolution proposed by Sir Travers Twiss supported by Count Sparre of Sweden, to the effect that the Suez Canal and similar international works should be declared free in case of war, and not be subject to any restrictive measures on the part of belligerents.——Newgate Prison has been condemned but it will not fall alone. The old Bailey is to be removed and a new block of buildings will take its place. Within the dock to be removed have stood Jack Sheppard, Jonathan Wild and the poet Savage, whose biography was one of the best that Dr. Johnson wrote. It was in the Old Bailey that the regicides had their trial, but that portion of the original structure has disappeared. It is many and curious forms of law that the Old Bailey has seen come and go. "The hangman no longer," says the *Echo*, "sits down by the side of a prisoner halter in hand, as he did in 1669;" and the awful warrants are no longer issued in shoals, as formerly, or in the "good old days." The Old Bailey Chronicles, however, are enough to make the mind of man shudder over the fallibility of verdicts and the cruelty of law. Is it credible that, when a new set of courts have been provided, a new spirit will be prepared to enter them?